

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Juan Gonzalez, et al.,

NO. C 08-03814 JW

Plaintiffs,

**ORDER GRANTING DEFENDANT'S
DISMISS WITH LEAVE TO AMEND**

v.

DDR Partners, Inc.,

Defendant.

Presently before the Court is Defendant's Motion to Dismiss or to Strike Class Allegations.¹

Juan Gonzalez and Ricardo Mendoza (collectively, "Plaintiffs") bring this action against DDR Partners, Inc. ("Defendant") alleging, *inter alia*, violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.*² Plaintiffs allege that Defendant failed to adequately compensate them and others similarly situated while employed by Defendant. The Court finds it appropriate to take the motion under submission without oral argument. See Civ. L.R. 7-1(b).

Defendant moves to dismiss or to strike all class-related allegations on the ground that Plaintiffs fail to provide sufficient allegations to proceed as a putative class action under Fed. R. Civ. P. 23. (Motion at 2.) Defendant does not seek to dismiss Plaintiffs' "collective" cause of action under the Fair Labor Standards Act ("FLSA"). (Motion at 3, n.2.)

¹ (Motion to Dismiss or, in the Alternative, Strike Class Allegations, hereafter, "Motion," Docket Item No. 25.)

² (Class Action Complaint, hereafter, "Complaint," Docket Item No. 1.) Plaintiffs allege violations of California Labor Code Sections 203, 226.7, 510 and California Business and Profession Code Section 17203.


“FLSA and [Fed. R. Civ. P.] 23 provide different means for participating in a class action: FLSA provides for participation on an opt-in basis (see § 216(b)), while Rule 23 requires that nonparticipating class members affirmatively opt-out of the suit (see FRCP 23(c)(1)(B)).” Leuthold v. Destination America, Inc., 224 F.R.D. 462, 469 (N.D. Cal. 2004).

In this case, there appears to be some ambiguity in Plaintiffs’ pleadings. First, the Complaint is titled “Class Action Complaint.” (Complaint at 1.) Second, the factual allegations begin with: “[t]his is a class action on behalf of putative members who had been employed by Defendants [sic].” (Complaint ¶ 1.) Plaintiffs also represent in a Joint Case Management Statement that one of the legal issues in this case is “whether Plaintiffs can satisfy the requirements of the FLSA and F.R.C.P. Rule 23 to certify a collective and/or class action.”³ However, in response to Defendant’s Motion, Plaintiffs represent that they are not pursuing a Rule 23 class action, but are instead only pursuing a collective action under § 216(c) of the FLSA.⁴

In light of the confusion caused by Plaintiffs’ pleadings, the Court finds that Plaintiffs should file an amended pleading to properly allege a collective action under the FLSA instead of a class action under Rule 23. Accordingly, the Court GRANTS Defendant’s Motion to Dismiss with leave to amend. Plaintiffs shall file an Amended Complaint on or before **April 6, 2009**.

The parties shall also appear for a Case Management Conference on **April 27, 2009 at 10 a.m.** On or before **April 17, 2009**, the parties shall meet and confer and file a Joint Case Management Statement. The Statement shall set forth a good faith discovery plan with a proposed date for the close of all discovery.

Dated: March 25, 2009


 JAMES WARE
 United States District Judge

³ (Joint Case Management Statement at 2, Docket Item No. 17.)

⁴ (Plaintiffs’ Opposition to Defendant’s Motion to Strike Class Action at 1-3, hereafter “Opposition,” Docket Item No. 29.)

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

2 Adam Wang waqw@sbcglobal.net
3 Eric Meckley emeckley@morganlewis.com

4 **Dated: March 25, 2009**

Richard W. Wieking, Clerk

6 **By: /s/ JW Chambers**
7 **Elizabeth Garcia**
8 **Courtroom Deputy**